Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

79-1132

In the
Supreme Court of the United States

OCTOBER TERM, 1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation,
Appellant

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana,
Appellees.

MOTION TO DISMISS OR, ALTERNATIVELY, TO AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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79-1132

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, Appellant

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana, Appellees.

MOTION TO DISMISS OR, ALTERNATIVELY, TO AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

Appellees Communications Workers of America [herein after, CWA] and Rae S. Bauer respectfully submit the following Motion to Dismiss or, Alternatively, to Affirm pursuant to to S.Ct.R. 16.

QUESTIONS PRESENTED BY THE APPEAL

1. Is §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act preempted from application against Appellant

The Mountain States Telephone and Telegraph Company by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*?

2. Is §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act preempted from application against Appellant The Mountain States Telephone and Telegraph Company by the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §141 *et seq.*?

STATEMENT OF THE CASE

This appeal arises from the opinion and judgment of the Montana Supreme Court entered on October 22, 1979.[1] In relevant part, such opinion held §39-7-203(3), M.C.A. 1979, of the Montana Maternity Leave Act [hereinafter, Maternity Leave Act] not preempted by §514(a) of the Employee Retirement Income Security Act of 1974 [hereinafter, ERISA], 29 U.S.C. §1144(a), or the Labor Management Relations Act of 1947, as amended [hereinafter, LMRA], 29 U.S.C. §141 *et seq.* Section 39-7-203(3) reads:

> "...It shall be unlawful for an employer or his agents to:
>
> • • •
>
> (3) Deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties...."

[1]The Montana Supreme Court's opinion is unofficially reported at 32 F.E.P. Cases 212.

As construed by the Montana Supreme Court, §39-7-203(3) renders unlawful the exclusion from coverage under employee benefit plans of pregnancy-related disabilities. [Montana Supreme Court Opinion, Appendix A-29 - A-32] Every pregnancy-related disability arising from conception through termination of gestation and a reasonable period of recovery therefrom is subject to §39-7-203(3). *[Ibid.]*

This litigation commenced on February 11, 1976 when Appellee Bauer, then an employee of Appellant The Mountain States Telephone and Telegraph Company [hereinafter, Mountain States], filed a verified complaint with the Commissioner of the Department of Labor and Industry for the State of Montana. [Commissioner's Findings of Fact and Conclusions of Law, Appendix C-4] The verified complaint alleged violation of §39-7-203(3)[2] because of Mountain States' refusal to compensate her under its employee benefit plan for disability resulting from her pregnancy. Appellee Bauer had commenced a maternity leave in connection with such pregnancy on October 15, 1975. [*Id.*, Appendix C-3] Administrative proceedings before the Commissioner or his hearing examiners continued until October 12, 1977, when the Commissioner issued findings of fact and conclusions of law. During these proceedings Mountain States contended, *inter alia*, that §39-7-203(3) was preempted under §514(a) of ERISA and that, because the collective bargaining agreement between it and CWA did not provide benefits for disabilities arising from pregnancy, any state attempt to modify the status of the collectively bargained relationship with CWA was subject to preemption under the LMRA. The Commissioner, however, rejected Mountain States' federal preemption claims and concluded that Appellee Bauer

[2]Appellee Bauer's complaint made specific reference to §41-2603, R.C.M. 1947, of the Maternity Leave Act. The Montana Code was revised in 1979, and §41-2603 became §39-7-203.

was entitled to four weeks of full pay and fourteen weeks of half pay under its benefit plan. [*Id.*, Appendix C-12 - C-21, C-25] Mountain States thereafter sought judicial review of the Commissioner's decision in the District Court for the First Judicial District of the State of Montana. On August 14, 1978 the District Court issued its opinion which concluded that §39-7-203(3) was preempted by §514(a) of ERISA. [District Court Opinion, Appendix B-2 - B-11] The District Court did not address the LMRA preemption question because of its ruling as to the effect of §514(a). [*Id.*, Appendix B-12 - B-13]

The Montana Supreme Court's reversal of the District Court was predicated on its conclusion that ERISA was not intended to affect the administration or operation of Title VII of the Civil Rights Act of 1964, as amended [hereinafter, Title VII], 42 U.S.C. §2000e *et seq*. The Court based such conclusion principally on §514(d) of ERISA, 42 U.S.C. §1144(d), which reads:

> "...Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this Title) or any rule or regulation issued under any such law."

After quoting extensively from several decisions which rejected claims of ERISA preemption of state employment discrimination laws on the basis of the potential impairment of Title VII,[3]

[3] *Bucyrus-Erie Co. v. Department of Industry*, 453 F.Supp. 75 (E.D.Wis. 1978), *aff'd*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3448 (Jan. 14, 1980); *Goodyear Tire & Rubber Co. v. Department of Industry*, 87 Wis.2d 56, 273 N.W.2d 786 (Ct.App. 1978); *Illinois Bell Tel. Co. v. Fair Emp. Prac. Comm'n*, 68 Ill.App. 3d 829, 25 Ill. Dec. 328, 386 N.E.2d 599 (1979); *Westinghouse Elec. Corp. v. State Human Rights Appeals Board*, 60 A.D. 2d 943, 401 N.Y.S.2d 597 (1978); *Lukus v. Westinghouse Elec. Corp.*, 21 F.E.P. Cases 118 (Pa.Ct.C.P. 1978); *Time Ins. Co. v. Department of Industry*, 16 F.E.P. Cases 391 (Wis.Dist.Ct. 1978).

the Court reasoned "[t]here is nothing in ERISA which treats the area of employment discrimination. The problem arises because we are dealing with two statutes - one state and one federal - that seek to regulate separate activities although some overlapping areas exist between them. While ERISA supersedes state laws relating to employee benefit plans, it does not expressly supersede all state fair employment laws, nor does it mention them. Indeed, given the history of Title VII, it would have been illogical if it had." [Montana Supreme Court Opinion, Appendix A-22] The Court concluded its ERISA preemption analysis by noting that "[t]o hold for preemption would be to create an enormous vacuum in areas that have heretofore been traditionally dealt with by the states through the liberal intent of Title VII." [*Ibid.*]

The Montana Supreme Court rejected Mountain States' LMRA preemption claim largely on the basis of *Malone v. White Motor Corporation*, 435 U.S. 497 (1978), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Agreeing with the Wisconsin Court of Appeals' analysis in *Goodyear Tire & Rubber Co. v. Department of Industry, supra*, 273 N.W.2d 798, it recognized as controlling the express saving of state employment discrimination laws in §1104 of Title XI, 42 U.S.C. §2000h-4, and " 'that there was no "intent on the part of Congress to occupy the field..." of sex discrimination in employment to the exclusion of state laws on the same subject matter.' " [Montana Supreme Court Opinion, Appendix A-24] It thus refused to imply preemption of §39-7-203(3), otherwise protected by Title VII, under the LMRA. The Court further reasoned that, relying upon *Gardner-Denver*, the rights under §39-7-203(3) "are uniquely personal and may not be waived through the collective bargaining process." [*Id.*, Appendix A-27 - A-28] Finally, the Court rejected Mountain States' reliance on *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and *Mach-*

inists Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), concluding that, unlike those cases, §39-7-203(3) fell "in an area of traditional local concern which only peripherally affects the collective bargaining process. . . ." [*Id.*, Appendix A-27]

ARGUMENT

I.

Mountain States contends that the Montana Supreme Court's decision "clearly raises the question of whether §514(a) of ERISA. . .is to be interpreted to allow a state to regulate the substantive provisions of employee benefit plans." [Jurisdictional Statement at 10] It later states that §39-7-203(3) "creates a multiplicity of tribunals to consider claims on the subject matter upon which Congress has already acted. This resulting procedural multiplicity frustrates the stated object of federal uniformity every bit as much as the state substantive law on the same subject matter." [*Id.* at 12] It rejects the Court's reliance on §514(d) because (1) such reliance ignores that §514(d) allegedly saves only federal statutes from preemption and (2) the Court misconstrued the relevant legislative history of Title VII and ERISA. [*Id.* at 13]

Initially, it must be noted that §514(a) is a broad preemption provision. Whether, but for §514(d), §39-7-203(3) would be preempted is indeed problematical. *Bucyrus-Erie Co. v. Department of Industry*, 599 F.2d at 208-10.[4] However, the principal issue herein is, as recognized by the Montana Supreme Court, the proper construction and application of §514(d). Determination of that issue necessarily turns on (1) the relationship between ERISA and Title VII and (2) the relationship between state employment discrimination laws and Title VII.

[4]The only appellate decision rejecting preemption of a state employment discrimination statute on the specific basis that such statute fell without the purview of §514(a) is *Gast v. State*, 36 Or.App. 441, 585 P.2d 12 (1978).

There can be no question that ERISA is wholly unconcerned with employment discrimination. Such conclusion is warranted not only by the absence of any provision in ERISA either prohibiting such discrimination or providing remedies therefor but also by pertinent legislative history. 119 Cong. Rec. 30409-410 (1973) [Senators Mondale and Williams]; 120 Cong.Rec. 4726 (1974) [Representatives Abzug and Dent] The colloquies between Senators Mondale and Williams and Representatives Abzug and Dent unquestionably indicate that Congress intended to leave the *remedial scheme* of Title VII unaffected by ERISA.[5] The intention to leave Title VII's legislative scheme unaffected was, of course, made explicit in §514(d). That §514(d) permits state laws, which otherwise would arguably be preempted, to remain effective if saved by another federal statutory scheme is indisputable. See, *e.g.*, *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *Bucyrus-Erie Co. v. Department of Industry*, 599 F.2d at 210. Thus, whether this appeal raises a sustantial federal question as to alleged ERISA preemption must be determined with direct reference to the relationship between Title VII and state employment discrimination laws – an issue which is virtually unaddressed in Mountain States' Jurisdictional Statement.[6]

[5]It should be noted that the colloquies in question occurred on the last day of consideration of the Senate and House versions of ERISA. 119 Cong.Rec. 30424; 120 Cong.Rec. 4781. Such versions were later formed into the present statute during Conference Committee. While the ERISA preemption provisions were strengthened in Conference Committee, there is no indication that such strengthening was intended to modify the expressed commitment of employment discrimination to Title VII's remedial scheme. Moreover, as stated in the text, finding such an intent would effectively negative §514(d).

[6]Mountain States passingly notes that "the legislative history of Title VII of the Civil Rights Act does not support the construction given to it by the Montana Court." [Jurisdictional Statement at 13] Mountain States does not, however, develop the analytical basis for this assertion.

As stated in *Bucyrus-Erie*, 599 F.2d at 210-11, "it is clear that the federal scheme embodied in [Title VII's] laws, rules and regulations contemplates and encourages enforcement of state fair employment statutes as an integral component of the federal statutory framework." The court based this conclusion both on the non-preemption provisions of §§708 and 1104 and on the "enforcement system [in §706] premised on the enforcement and preservation of state fair employment laws." *Id.* at 211. The legislative history of Title VII amply supports the Seventh Circuit's textually-based conclusions.

Congress was acutely aware that, at the time of Title VII's adoption, many states had previously enacted fair employment laws. Senator Humphrey accordingly noted that twenty-five states had such laws[7] and that their coverage was "generally as broad or broader" than the proposed coverage of Title VII. 110 Cong.Rec. 6548 (1964). He noted during the same discussion that Title VII would provide "for the continuing effectiveness of state laws and procedures dealing with discrimination in employment." *Id.* at 6550. Indeed, a principal purpose of the Dirksen-Mansfield amendments was to ensure that states would have the first opportunity to deal with employment discrimination,[8] because as Senator Humphrey pointedly noted:

> "Problems of civil rights will ultimately be settled at the community level. The Federal Government has its share of the responsibility, in a sense that all of us are citizens of the United States of America, but these are also human problems. economic problems, moral problems and they become very much community problems.
>
> "Therefore, one of the improvements I see in [the Dirksen-Mansfield substitute]. . .is the inclusion within the words and text of the amendment of provision for the responsibility of Local and State authorities to seek compliance with the law, whenever possible, through voluntary methods, and, if voluntary methods fail, to seek compliance with the law through local enforcement. If voluntary methods and local enforcement should both fail, we then have the authority to seek compliance with the law through action by the Federal Government in the courts of law. This is a common sense and just balance of Federal and State responsibility." *Id.* at 11936.

[7]See R. Berg, *Equal Employment Opportunity under the Civil Rights Act of* 1964, 31 Brooklyn L.Rev. 62, 67 (1964).
[8]See generally F. Vass, *Title VII, Legislative History*, 7 B.C.Ind. & Com.L.Rev. 431, 452-53 (1966).

Senator Dirksen echoed Senator Humphrey's comments. *Ibid.*; see also *id.* at 7205 [Senator Case discussing state-federal cooperation under Title VII]; *id.* at 9640 [Senator Scott discussing the addition of §1104 as reflective of Congress' intention to preserve the traditional state role in employment discrimination matters]; see generally *Love v. Pullman Company*, 404 U.S. 522, 526 (1972); *Alexander v. Gardner-Denver Co.*, 415 U.S. at 48-49; *Moore v. Sunbeam Corporation*, 459 F.2d 811, 824-25 (7th Cir. 1974); *Bell v. Wyeth Laboratories, Inc.*, 448 F.Supp. 133, 135 (E.D.Pa. 1978); *cf. Oscar Meyer & Co. v. Evans*, 99 S.Ct. 2066, 2071 (1979) [§14(b) of Age Discrimination in Employment Act, like §706(b) of Title VII, intended to keep from federal courts those discrimination complaints that might be settled to the satisfaction of the claimant in state proceedings.]

Consequently, the contention that Title VII's legislative scheme would not be modified by preemption of §39-7-203(3) of the Maternity Leave Act lacks any substantial merit. The only appellate decisional support for such contention is the Second Circuit Court of Appeals' brief and cryptic affirmance in *Pervel Industries, Inc. v. Department of Industry*, 468 F.Supp. 490 (D.Conn. 1978), *aff'd*, 603 F.2d 214 (1979), *cert. denied*,

48 U.S.L.W. 3448 (Jan. 14, 1980). Whatever the precise meaning of the Second Circuit's affirmance, it can only be viewed as failing to recognize and weigh properly the integral importance of state employment discrimination laws to the overall legislative scheme of Title VII. Indeed, the Second Circuit's reasoning, if given literal interpretation, is obviously circuitous since the passage of the Pregnancy Disability Amendment to Title VII, 42 U.S.C. §2000e(k), could not save state laws from preemption if states were conclusively excluded from regulating emloyment discrimination relating to benefit plans by §514(a)[9] The absence of well-reasoned authority in support of Mountain States' position clearly militates against the substantiality of the federal question allegedly attendant to the ERISA preemption issue.

Lastly, Mountain States' reliance on the colloquy between Senators Javits and Williams during debate over the 1978 amendments to the Age Discrimination in Employment Act is manifestly ill-placed. Not only are such statements of non-controlling significance,[10] but premising preemption of §39-7-203(3) on them would be in direct conflict with statements made in the House and Senate reports accompanying the legislative proposals which resulted in the Pregnancy Disability Amendment. H.Rep.No.85-948, 95th Cong., 2d Sess. 11, *reprinted in* [1978] U.S.CodeCong. &Ad.News 4749, 4758; S.Rep. No. 5-331, 95th Cong., 1st Sess. 3n.1 (1977). Both of those reports recognized the existence, and assumed the validity, of

[9]Mountain States may contend, as it did before the Montana Supreme Court. that enactment of the Pregnancy Disability Amendment saves §39-7-203(3) because it renders the federal and state statutes' substantive coverage of discrimination coterminous. However, that argument implicitly assumes that states are enforcing Title VII rather than their own statutes. That assumption is, of course, patently erroneous. *Cf. E.E.O.C. v. Delaware Trust Co.*, 416 F.Supp. 1040, 1044 (D.Del. 1976) [federal district court will not inquire into whether state administrative agency meaningfully investigated discrimination claim under state employment discrimination law].

[10]See, *e.g., Haynes v. United States*, 390 U.S. 85, 87n.4 (1968); *United States v. Price*, 361 U.S. 304, 313 (1960).

state laws requiring pregnancy-related disabilities to be treated as forms of sex discrimination. *Bucyrus-Erie*, 599 F.2d at 212. It is evident, therefore, that little or no weight may appropriately be attached to Senators Javits and Williams' statements which, aside from not addressing the relationship between ERISA and Title VII, can hardly be seen as a careful exposition of the scope or purpose of §514(d).[11]

In summary, Mountain States has failed to establish the substantial nature of the ERISA preemption question. *Minnesota Mining & Man. Co. v. State*, Nos. 49079 and 49137 (Minn. S.Ct. Aug. 10, 1979, *appeal dismissed for want of substantial federal question*, 48 U.S.L.W. 3460 (Jan. 21, 1980). Moreover, even if such question is deemed substantial, the Montana Supreme Court's decision should be affirmed for those reasons stated in its opinion and in those appellate decisions rejecting similar preemption claims premised on §514(a).[12]

II.

Mountain States does not state with any specificity those grounds upon which it asserts the substantiality of the LMRA preemption issue. However, *Malone v. White Motor Corporation*, 435 U.S. 283 (1978), and *Alexander v. Gardner-Denver Co., supra*, establish clearly that no substantial federal question exists as to LMRA preemption.

Malone involved a state statute regulating pension funds,

[11]Thus, if given literal effect, the Javits-Williams exchange would preclude states from *ever* acting upon claims of age discrimination under benefit plans. Such preemption would have an obvious impact upon the mandatory requirement of filing age discrimination claims with state agencies. *Oscar Meyer & Co. v. Evans, supra.* That age discrimination may exist in connection with such plans is apparent. See, *e.g., United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The Javits-Williams statements would seem, therefore, to reflect a highly anomalous, and incorrect, reading of §514(d) even with respect to age discrimination claims.

[12]See n.3, *infra;* see also *Minnesota Mining & Man. Co. v. State*, supra.

alleged to be preempted because of its interference with obligations determined through collective bargaining. As instantly, the question was whether Congress intended to preempt implicitly under the LMRA a state law whose adoption was specifically authorized by another federal statute. In answering that question negatively, the Court noted that, under §10(b) of the Welfare and Pension Plans Disclosure Act, "Congress clearly envisioned an exercise of state regulation over pension funds..." and thus refused to imply LMRA preemption. *Id.* at 514.

Malone is obviously dispositive of Mountain States' preemption plan under the LMRA. Sections 708 and 1104 of the Civil Rights Act were, as discussed above, intended to preserve state power to adopt and enforce laws dealing with employment discrimination. Those provisions are consequently indistinguishable in effect from §10(b) of the Welfare and Pension Plans Disclosure Act. It would be entirely incongruous to hold that Congress, while expressly authorizing states to adopt employment discrimination statutes, simultaneously desired such statutes to be *impliedly* preempted under the prior-enacted LMRA. Manifestly, Congress had no such intent, and Mountain States' preemption arguments lack even colorable substantiality. See *Brown Company v. Department of Industry,* 476 F.Supp. 209, 211-12 (W.D.Wis. 1979); *Goodyear Tire & Rubber Co. v. Department of Industry, supra,* 273 N.W.2d 797-98; see generally *New York Telephone Company v. Department of Labor,* 99 S.Ct. 1328, 1341-44 (1979); *cf. In Re Marriage of Campa,* 89 Cal.App.3d 83, 126-27, 152 Cal.Rptr. 362, 369-70 (1979), *appeal on the grounds dismissed for want of substantial federal question,* 48 U.S.L.W. 3447 (Jan. 14, 1980) [state court not preempted by LMRA from joining §302 pension funds in marriage dissolution proceedings and from ordering division of pension benefits].

Gardner-Denver is equally dispositive. As noted by the Montana Supreme Court, *Gardner-Denver* recognized that Title VII rights were not subject to "the majoritarian give-and-take of collective bargaining." *United States v. Allegheny-Ludlum Industries,* 517 F.2d 826, 858-59 (5th Cir. 1975). It would be anomalous to conclude that such reasoning is inapplicable to state laws affirmatively protected and encouraged by Title VII. Such a conclusion would not only be inconsistent with the legislative scheme of Title VII but also ignore the well-established local interest in remedying employment discrimination. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.,* 372 U.S. 714 (1963); *Goodyear Tire & Rubber Company v. Department of Industry, supra,* 273 N.W.2d 800. Consequently, Mountain States' appeal as to the LMRA preemption issue should be dismissed for want of a substantial federal question.

CONCLUSION

CWA and Appellee Bauer respectfully request that this appeal be dismissed for want of a substantial federal question or, alternatively, that the judgment of the Montana Supreme Court be summarily affirmed without plenary consideration.

Respectfully submitted,

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